RECORD
AND
BRIEFS

Nos. 16-285, 16-300, 16-307

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION, *Petitioner*,

v.

JACOB LEWIS, *Respondent*.

ERNST & YOUNG LLP, AND ERNST & YOUNG U.S., LLP, *Petitioners*,

v.

STEPHEN MORRIS AND KELLY MCDANIEL, *Respondents*.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

MURPHY OIL USA, INC., ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF FOR SUSAN FOWLER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 16-285 AND 16-300, AND PETITIONER IN NO. 16-307

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INTEREST OF *AMICUS CURIAE*[1]

Susan Fowler is a former Uber employee. On February 19, 2017, she published a blog post entitled "*Reflecting On One Very, Very Strange Year At Uber*."[2] The blog post detailed her experiences at Uber, including her futile efforts to address workplace harassment, discrimination, and retaliation on the job.

As reported in the press, the blog post led to an investigation by former Attorney General Eric Holder. This investigation, in turn, resulted in more than 200 employee complaints, at least 20 terminations, and the eventual resignation of Uber's CEO, all arising from Uber's toxic culture.[3] But for Ms. Fowler's perhaps naïve courage in publishing her post – for which she faced an attempted smear campaign and a surreptitious investigation into her friends and family – Uber's workplace would have remained exactly the same.

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Further, amicus curiae states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submissions of this brief. No person or entity, other than the amicus curie or their counsel, has made a monetary contribution to this brief's preparation or submission. *See* SUP. CT. R. 37.6.

[2] https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber.

[3] E.g., Mike Isaac, *Uber Fires 20 amid Investigation into Workplace Culture*, N.Y. TIMES, June 6, 2017, available at https://www.nytimes.com/2017/06/06/technology/uber-fired.html.

Uber required Ms. Fowler to sign a class action waiver[4] as a condition of employment. Uber makes all its workers sign these waivers. These waivers are now ubiquitous in the high tech industry and "gig economy," where the likelihood unionization is remote.

Class action waivers take from these workers the concerted activity in which they are most likely to engage, and from which they are most likely to benefit: The right to engage in collective litigation.

Fowler, as a former Uber employee subject to its class action waiver, has a significant interest in the outcome of these consolidated cases.

SUMMARY OF ARGUMENT

I. As the Uber example demonstrates, companies do not require arbitration agreements with class action waivers to resolve disputes "cheaply or quickly." Companies require class action waivers to limit or eliminate the legal risk associated with systemic – and potentially or certainly illegal – employment practices.

II. The right to litigate collectively is particularly important in the 21st century in that such litigation is the most readily available means for modern day workers to act in concert to improve their working conditions. Much of the modern workforce cannot reasonably engage in the "traditional" concerted activity of strikes or picketing.

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[4] The term "class action waiver" in this brief refers to the requirement that individual employees waive the right to participate in collective litigation, collective actions, collective arbitration, or similar conduct as a condition of employment.

III. Collective litigation – when meritorious – usually results in settlement negotiations (or bargaining), a "collective" settlement agreement, an improvement in working conditions, and a reduction of industrial strife. Without the right to collective litigation, there will be more systemic employment law violations, less effective ways to remedy them, and the balance between companies (i.e., capital) and talent (i.e., labor) will shift firmly in favor of capital.

This is contrary to Congress's intent in passing the NLRA.

ARGUMENT

I. THE PRIMARY PURPOSE OF CLASS ACTION WAIVERS IS TO LIMIT LIABILITY ARISING FROM SYSTEMIC ILLEGAL EMPLOYMENT PRACTICES

A. Employment Arbitration Is neither Cheap nor Efficient

Employment arbitration is really expensive. To ensure an enforceable arbitration agreement, employers typically agree to pay the entire cost of arbitration. See, e.g., *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (noting that large arbitration costs could preclude the vindication of statutory rights); AAA EMP. ARB. RULES & MEDIATION PROC., p. 31-33 (requiring employers who use the AAA to pay the cost of the arbitrator).[5] Arbitrator fees can

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[5] The AAA is the largest private provider of alternative dispute resolution services in the United States. AAA EMP. ARB. RULES & MEDIATION PROC., p. 7-8 (effective Nov. 1, 2009), available at

range from $300 an hour to $15,000 a day, plus administrative fees. Deborah Rotham, *Trends in Arbitrator Compensation*, DISPUTE RESOLUTION MAGAZINE, Spring 2017, at 8. As in court, an employee must pay his or her own attorneys' fees and costs. AAA Rules, R. 45.

In addition to being really expensive, employment arbitration is not particularly efficient. If an employer "slow-pays" the arbitrator (or does not pay at all), then the arbitration does not proceed. This allows the employer to dictate the pace of the proceedings. AAA Rules, R. 46, 47. Arbitration discovery by way of depositions, interrogatories, and document production is commonplace. Under the Federal Arbitration Act, the arbitrator may issue subpoenas (though a party must go to court to enforce them), 9 U.S.C. § 7, and an arbitrator must hear all "evidence pertinent and material to the controversy," or risk having the arbitration award vacated, 9 U.S.C. § 10(a)(3).

The legal fiction that employers require employment arbitration because it is "cheap and efficient" must be tempered with reality. Not all employers require arbitration, and if arbitration was such a superior dispute resolution method, they would. Rather, "[t]he employers that gain the most from arbitration (the discrimination prone or high-risk employers) will use mandatory arbitration. On the other hand, low-risk employers, because they do not want to pay the price implicit in mandatory arbitration (since it does not reflect their specific risk level), will

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https://www.adr.org/sites/default/files/Employment%20Rules.pdf ("hereinafter AAA Rules").

forego the risk-averting benefits of arbitration and take their chances on litigation. High-risk employers arbitrate; low-risk employers litigate." Scott Baker, *A Risk Based Approach to Mandatory Arbitration*, 83 Or. L. Rev. 861, 864 (Fall 2004).

For employers, then, the primary benefit of employment arbitration is not that it is "cheap and efficient." The primary benefit is the employer's belief that the arbitration agreement is necessary to secure the class action waiver,[6] and the class action waiver – which prohibits today's workers' most effective means of concerted activity – is too good a deal for even a virtuous large employer to pass up.

B. The Uber Example

Uber Technologies, Inc. ("Uber") employs hundreds of thousands of workers in the United States: 6000 "W-2 employees" and more than 600,000 "1099 drivers" (who are either employees or independent contractors – a subject of much dispute). Amir Efrati, *How Uber Will Combat Rising Driver Churn*, THE INFORMATION April 20, 2017, available at https://www.theinformation.com/how-uber-will-combat-rising-driver-churn.

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[6] Note that the Fifth Circuit recently ruled that an employer can require employees to waive the right to proceed collectively in litigation even without an arbitration agreement. *Convergys Corp. v. NLRB*, No. 15-60860, ___ F.3d. ___, 2017 WL 3381432 (5th Cir. Aug. 7, 2017). One judge dissented from this opinion and a second judge concurred in judgment only. *Id.* at * 5. The concurring judge stated: "[i]f we were writing on a clean slate, I would urge that this court adopt Chief Judge Wood's and Chief Judge Thomas's reasoned understandings of Section 7's scope." *Id.*

Uber's standard contract for all these workers contains an arbitration agreement with a class action waiver. By intention, Uber is a "high-risk employer" as it relates to compliance with employment (and numerous other) laws.

In addition to the toxic workplace culture faced by Susan Fowler and others, Uber has been accused repeatedly of systematically violating a wide-swath of federal and state employment laws in federal court class actions. These allegations include stealing driver tips, failing to pay minimum wage and overtime, lying to employees about their equity compensation, electronically spying on drivers who work for a competitor, and the list goes on.[7]

Uber's typical response to this litigation is to say that workers cannot engage or participate in the concerted activity of collective litigation. For Uber, even 1000 very expensive individual arbitrations is exponentially cheaper than a single class action judgment.

Numerous other technology employers – even those without Uber's reputation or track record – have performed the same cost/benefit analysis with respect

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[7] Most recently, the Wall Street Journal published an article describing how Uber knowingly rented, to its Singapore workforce, defective cars that might catch on fire. Douglas MacMillan and Newly Purnell, *Smoke, Then Fire: Uber Knowingly Leased Unsafe Cars to Drivers*, WALL ST. J., August 3, 2017, available at https://www.wsj.com/articles/smoke-then-fire-uber-knowingly-leased-unsafe-cars-to-drivers-1501786430. From Uber's $70B valuation perspective, if one worker (or her family) sues after being burned alive, oh well. A class action, on the other hand. . . .

to class action waivers.[8] And, once a class action waiver is in place, it is that much easier for even the virtuous employer to be a little less virtuous. This in turns results in greater reliance on the waivers as "low-risk employers" who would normally forego arbitration, transform into "high-risk employers" who rely on it.

Accordingly, and today, if a person wants to work for a technology company – whether as an "employee" or as an "independent contractor" – he or she will likely be forced to waive their right to pursue collective litigation as a condition of their employment.

II. CLASS ACTION WAIVERS PROHIBIT THE PRIMARY MEANS OF CONCERTED ACTIVITY FOR 21ST CENTURY WORKERS

Congress has found that a single employee is "commonly helpless to exercise liberty of contract." 29 U.S.C. § 102. For this reason, "yellow dog contracts" – through which employers require individual employees to waive the right to engage in concerted activity – are illegal. 29 U.S.C. § 103.[9]

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[8] Among many others, both Google and Facebook require their workers to agree to arbitration with a class action waiver. *E.g.*, Google, Inc. and Nest Labs, Inc., A Single Employer, NLRB Case No. 32-CA-178708 available at https://www.nlrb.gov/case/32-CA-178708 (follow Signed Charge Against Employer, dated June 21, 2016 hyperlink).

[9] A union, by contrast, can waive the right to concerted activity on behalf of the employees it represents. This is because a labor organization, unlike individual workers, has economic power and will presumably only waive this right in exchange for something more valuable. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 707 (1983).

For much of the 20th century, workers engaged in concerted activity in aid of collective bargaining primarily in two ways: strikes and picket lines. Today, this type of concerted action is of limited value to millions of workers because of changes in technology and the rise of the "gig economy."

For example, 22% of all workers, and 43% of workers with advanced degrees, work remotely (at least on occasion). They are connected to their co-workers, managers, and customers by email, phone, computer networks, and video conferencing. American Time Use Survey News Release, USDL-17-0880 (Bureau of Labor Statistics June 27, 2017), available at https://www.bls.gov/news.release/atus.htm.

The percentage of telecommuters will increase over time because remote work decreases a company's operating costs and "working remotely" is fast becoming the norm for new entrants to the labor market. *See, e.g.* Jeanne Meister, *Flexible Workspaces: Employee Perk or Business Tool to Recruit Top Talent*, FORBES, April 1, 2013, available at https://www.forbes.com/sites/jeannemeister/2013/04/01/flexible-workspaces-another-workplace-perk-or-a-must-have-to-attract-top-talent/#2649a15c2ce7; 2015 After College Annual Survey, available at https://www.aftercollege.com/cf/2015-annual-survey. By 2020, "1 in 3 people will be hired to work online, from anywhere they want." Meister, *supra*. On top of this, employees now change jobs frequently. According to one study, the median tenure at a job for "workers between ages 25 and 35 was 1.42 years; the median tenure for those between the ages 35 and 55 was under two years; and for those between ages 55 and 65, it was 2.53 years." Dana

Wilkie, *Who's Job-Hopping Now?*, SOC'Y FOR HUM. RESOURCE MGMT., June 23, 2017, available at https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/job-hopping-.aspx.

The 21st century has also brought us the "gig economy," where workers are generally classified as "independent contractors" (though they may actually be statutory employees). Typically, these workers "get individual gigs using a website or mobile app that helps to match them with customers." Elka Torpey and Andrew Hogan, *Working in a Gig Economy*, Bureau of Labor Statistics, May 2016, available at https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm.

Turnover among "gig employers" is immense. Uber, for example, hires about 50,000 new drivers a month. Alyson Shontell, *Uber is the world's largest job creator, adding about 50,000 drivers per month, says board member*, BUS. INSIDER, May 15, 2015, available at http://www.businessinsider.com/uber-offering-50000-jobs-per-month-to-drivers-2015-3. Many of these drivers quit once they experience the company, but "[w]hen fed-up drivers quit, new drivers are willing to take their place – twice as many drivers every six months." Ellen Huet, *Uber's Ever-Renewing Workforce: One-Fourth of Its Current U.S. Drivers Joined Last Month*, FORBES, Jan. 22, 2015, available at https://www.forbes.com/sites/ellenhuet/2015/01/22/uber-study-workforce/#6170b3de367a.

In light of these changes in the modern workforce, the "economic weapons" of concerted action so prevalent in the 20th century – strikes and picket lines – are ineffective. Workers, for example, cannot engage

in a meaningful work stoppage when there is an endless supply of "strike replacements" in the form of 50,000 new drivers per month, or when employees change jobs every 18 months. Nor can workers rely on picketing to publicize their labor dispute and discourage others from "crossing the picket line." There is no place to put the pickets, because workers are geographically dispersed (in their homes or at a Starbucks), or connected to their jobs through nothing more than a mobile app.

By necessity, then, the modern workforce must turn to the third leg of "concerted activity" to aggregate their economic power and improve their working conditions: Collective litigation.

III. THE RIGHT TO PURSUE COLLECTIVE LITIGATION FURTHERS THE INTENT OF CONGRESS IN PASSING THE NLRA

Because of the economic leverage that comes with the aggregation of employment claims, most meritorious collective employment actions result in settlement negotiations and a settlement agreement. A 2009 study of California Class Action Litigation, for example, found that 46.8% of employment class actions resulted in settlement, 12.4% were dismissed with prejudice, and the remaining were either dismissed without prejudice, removed to federal court, or resulted in some other disposition. Hilary Hehman, *Findings of the Study of California Class Action Litigation, 2000-2006: First Interim Report*, ADMINISTRATIVE OFFICE OF THE COURTS (March 2009), available at http://www.courts.ca.gov/documents/class-action-lit-study.pdf.

Settlements arising from collective litigation are agreements that, if approved, bind those members who choose to participate in the action. These settlements often result in – not only payment to the employees – but also agreed-upon changes to the employees' working conditions. *E.g., Lane v. Brown*, 166 F.Supp.3d 1180 (D. Ore 2016) (approving class settlement on behalf of disabled employees reducing use of segregated workshops); *Wren v. RGIS Inventory Specialists*, No. C–06–5778, 2011 WL 1230836 (N.D. Cal. Apr. 1, 2011) (approving class action settlement that includes changes to corporate policies concerning donning equipment); *Hall v. Best Buy Co., Inc.*, 274 F.R.D. 154 (E.D. Pa. 2011) (approving class action settlement that required changes to time keeping procedures).

In other words, collective litigation is, in a very real sense, something done in aid of "collective bargaining." When done correctly, *collective* litigation results in a *collective* [settlement] agreement, reduces industrial strife (because the dispute is resolved as to those employees who participate) and improves the workers' lot in life. Employers cannot, consistent with the NLRA, take from employees the right to pursue this form of concerted activity as a condition of employment – even with the help of an arbitration agreement. To do so is contrary to Congress's intent in passing the Act.

CONCLUSION

For these reasons, Ms. Fowler asks that the Court rule in favor of the National Labor Relations Board and the Plaintiffs/Employees with respect to the consolidated petition.

Respectfully submitted.

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